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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1100

NORTHERN FREIGHT LINES, INC., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Georgia, Atlanta Division

MOTION TO AFFIRM

JOHN E. ROBSON
ELROY H. WOLFF
1156 - 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Appellee, Railway Express Agency, Incorporated

Of Counsel:

LEIBMAN, WILLIAMS, BENNETT, BAIRD AND MINOW
1156 - 15th Street, N. W.
Washington, D. C. 20005

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017

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MOTION TO AFFIRM

Appellee, Railway Express Agency, Incorporated (REA), Intervenor Defendant in the proceeding below, moves pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the District Court.

STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court (J.S. App. B, reported at 304 F. Supp. 536) dismissing an action brought by appellants to set aside a report and order issued by the Interstate Commerce Commission (J.S. App. C) in a rulemaking proceeding. The Commission declined to adopt the rules urged by appellants and chose, instead, to retain its long-standing policy of permitting express companies flexibility in setting terminal areas by tariff publication.

In compliance with directions of the Commission,[1] REA has since 1913 published I.C.C. Tariff A-3, the Joint Directory of Express Stations, which indicates the type of service available at the various offices, and I.C.C. Tariff A-4 which defines express pickup and delivery limits at each office where such service is provided. Thus, over the years, REA and other express companies established and, as conditions warranted, altered the geographic limits of the terminal areas of their offices through tariff publication, subject at all times to review and modification by the Commission. For motor common carriers, on the other hand, the geographic limits of terminal area operations are set under criteria established by the Commission, pursuant to authority in Part II of the Interstate Commerce Act,[2] in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21 (1952).

Express companies have historically provided an integrated multi-modal small shipments transportation

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[1] *In Re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 390, 394 (1912); 28 I.C.C. 131 (1913).

[2] 49 U.S.C. § 301, *et seq.*

service, utilizing the most efficient mode of transport—rail, motor, water and air—in their inter-terminal ("line-haul") movements. Pick-up and delivery in terminal areas has always been an element of express service. Prior to passage of the Motor Carrier Act of 1935, the activities of express companies, including their terminal area operations, were regulated exclusively under Part I of the Act. After enactment of the Motor Carrier Act, the Commission ruled that express companies were required to proceed under Part II of the Act to obtain authority for their line-haul motor vehicle operations. *Railway Express Agency, Inc., Determination of Status*, 21 M.C.C. 161 (1939).

In *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd, Auclair Transp., Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964) the Commission noted that REA's increased reliance on motor transportation for line-haul movements, necessitated by the disappearance of railroad passenger trains, created the possibility that REA might be considered subject to varying terminal area limitations depending upon the mode of line-haul movement used for each shipment. The Commission stated that it did "not view this as a tolerable situation, and we will take the necessary steps to remove this probable uncertainty." *Nashua, supra*, at 338. Accordingly, the ICC on its own motion instituted a rule-making proceeding under 49 U.S.C. §§ 1, 12(1), 302(c)(2), 303(a)(14), 304 and Section 4 of the Administrative Procedure Act, 5 U.S.C. § 533, to inquire into terminal area practices of express companies. A hearing was held in which REA was the only express company participant.

The question addressed by the Commission in the rulemaking proceeding was "whether in the light of the national transportation policy, this formula [the MC-37 criteria] can or should be uniformly applied in the setting of terminal areas for express service." (J.S. 37a). The Commission decided that the MC-37 criteria should not be applied to express service for, in its judgment, to do so "would fail to recognize and adequately preserve a public service having certain unique and important attributes which clearly distinguish it from other forms of transportation." (J.S. 37a-38a). The Commission found that flexibility in the pattern of express company terminal areas is necessary because "express is a unique service and its concomitant, pickup and delivery service, has become even more important as numerous REA offices located in smaller communities are closed for economic and technological reasons and the availability of the express service previously rendered can only be assured by the consolidation of contiguous territory into larger terminal areas with more efficient facilities." (J.S. 40a).

The Commission recognized that there is some competition between the regulated motor carriers and REA, stating that "it cannot be denied that some motor carriers and freight forwarders may be affected by competition from REA generally . . . . " (J.S. 41a).[3] But the existence of some competition between motor carriers and REA did not, in the Commission's judgment, require identical terminal area treatment of the two. Instead, the Commission focused its concern on the fact that "express service has a distinctive character and that we cannot overlook the numerous benefits presently

[3] The Commission referred elsewhere in its report to the evidence of competition. See J.S. 25a, 34a, and 35a.

made available to the public which are generally unavailable from other types of carriers." (J.S. 38a). The Commission concluded that "in the absence of any substantial showing that the public interest would best be served by confining pickup and delivery to the more limited MC-37 terminal areas, we must proceed upon the policy of recognizing and encouraging express operations as one of the most practicable available means towards coordinating the various modes of transportation. . . ." (J.S. 41a).

In concluding that terminal areas for express carriers should continue to be set by tariff publication, the Commission cautioned that "such terminal areas are subject, however, to our review in the manner in which this has previously been accomplished under part I of the act" (J.S. 43a) and pointed out that tariffs relating to terminal areas are subject to investigation, suspension, and complaint proceedings. (J.S. 44a).

Applying the limited scope of review appropriate to agency rulemaking, in which the decision should be affirmed unless the ICC "acted in an arbitrary and capricious manner, in abuse of its discretion or otherwise out of accordance with the law . . ." (J.S. 9a), the three-judge court below unanimously upheld the Commission's Report and Order. The court held that "the ICC had a rational basis upon which to conclude that REA offered distinctive service meriting different terminal area treatment, than that received by ordinary motor carriers." (J.S. 17a).

ARGUMENT

I

The thrust of appellants' challenge to the Commission's decision has been directed to the wisdom of the policy adopted by the Commission in a rulemaking proceeding. Appellants thus would have the courts step outside their proper role in reviewing agency rulemaking, as recently restated by this Court:

> "It is not our duty, of course, to concern ourselves with a nice evaluation of the arguments as to whether the Commission pursued the course of wisdom. . . . It is our task to scrutinize the Commission's authority, not the substance of its exercise." *American Trucking Ass'ns, Inc.* v. *A.T. & S.F. Ry.*, 387 U.S. 397, 412 (1967).

Similarly, while both the Commission and the District Court underscored the ample record evidence distinguishing REA's service from that of motor common carriers, the "substantial evidence" test is inapplicable to this review of agency rulemaking. See, e.g., *Bridgeport Fed. Sav. & Loan Ass'n* v. *Fed. Home Loan Bank Bd.*, 199 F. Supp. 410 (E.D. Pa. 1961), *aff'd*, 307 F. 2d 580 (3d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *Tidewater Express Lines, Inc.* v. *United States*, 281 F. Supp. 995 (D. Md. 1968). Viewed in this context, it is manifest that the questions presented by appellants are so unsubstantial as not to need further argument.

II

Appellants' principal contention in this Court is that the Commission "declined to consider" evidence of

competition between REA and regulated motor carriers. (J.S. 10-11). This assertion is not supported by the facts. Indeed, the Commission stated in its report that "it cannot be denied that some motor carriers and freight forwarders may be affected by competition generally. . . ." (J.S. 41a).

Further, the District Court, after reviewing the same contention, properly rejected appellants' claim, pointing out that the ICC *did* recognize that an area of competition exists between REA and motor carriers. (J.S. 14a). The court found that the Commission "did not act arbitrarily in recognizing that competition was not necessarily the crucial factor in defining the terminal areas for REA." (*Id.*). Rather, as the court held after carefully reviewing the evidence in the record (J.S. 10a-12a), "whatever the competition involved, the ICC correctly found that REA performed a distinctive service unmatched by other carriers." (J.S. 14a).

III

Appellants claim that the conclusion that REA's express service is different from motor carrier service rests only on an "assumption" by the Commission, and that the Commission declined "to consider the question of the nature of REA express service and its relation to the ordinary freight service of motor carriers. . . ." (J.S. 9).

This, again, is not supported by the record. The Commission had before it evidence in the record showing, as the court below stated, "that REA performed a

distinctive service unmatched by other carriers" [4] (J.S. 14a) and found the public interest best served by continuing a terminal area policy designed to permit REA sufficient flexibility to serve the needs of the public. Stating that "the record is replete with evidence of shipper dependence on REA service," [5] the District Court referred to record evidence of some of the factors, in addition to REA's emphasis on small parcel traffic (J.S. 10a), on which "this public dependence is based." (J.S. 11a).

Emphasizing that the appellants "adduced no evidence that they are willing and able on a regular basis to provide comparable service" (J.S. 11a-12a), the court held that "by recognizing the unique service REA continues to make available the ICC has protected the shipping public." (J.S. 11a).

IV

Appellants argue that the Commission and the District Court erred in finding that a policy of flexible terminal areas for express companies is consistent with the National Transportation Policy. (J.S. 13). In essence, appellants' argument is that the Commission's decision runs afoul of the National Transportation

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[4] In fact, some of these appellants argued in *Denver & R.G.W.R.R.* v. *United States*, 387 U.S. 485 (1967) that the Interstate Commerce Commission "has consistently recognized certain fundamental differences between express service and ordinary freight service." Brief to the Supreme Court on behalf of the American Trucking Associations and other motor carrier interests at p. 23.

[5] Numerous shippers and shipper organizations supported REA in the proceeding before the Commission and each urged that the Commission maintain its flexible terminal area policies for express.

Policy because it tends to weaken the motor carriers' ability to compete with REA.

In fact, however, the motor carriers do not wish to compete but to avoid competition. As the District Court and the ICC both pointed out, the motor carriers "do not seek to expand their terminal area limits but to reduce REA's zones." (J.S. 15a-16a).

In any event, the National Transportation Policy does not demand that the ICC treat all modes and all carriers alike in all circumstances. The District Court examined and affirmed the Commission's decision in light of the tenets of the National Transportation Policy. In the court's view the Commission's decision acted to protect "the shipping public, dependent on REA for the expeditious handling of small, often special, parcels . . . " and that "the National Transportation Policy is preserved by protection of the public." (J.S. 15a). The court found that the ICC recognized the "inherent advantages" of express service in deciding to treat express terminal areas differently from motor carrier terminal areas. *Id.* Moreover, the court concluded that the appellants "are not left unprotected by the ICC's ruling nor are they put at an unfair advantage." (J.S. 16a). Thus, appellants' contention that the Commission or the court refused to weigh the "competitive consequences" of the Commission's action (J.S. 15) is not supported by the record.

Appellants' argument that the Commission erred because its decision results in "railroad incursions into the field of motor carrier service" (J.S. 16) is unfounded. First, as the District Court was advised before oral argument by REA and the United States

in their briefs, REA's railroad shareholders had formally accepted an offer to sell their interest in REA to a group of purchasers unrelated to the railroads and the sale has been consummated. Moreover, there is no "incursion" into motor carriage; the Commission's continuation of its long-standing, flexible terminal area policy does not grant to REA any new authority to conduct motor carrier service.

V

After arguing that the ICC erred *because* REA was railroad owned, appellants also contend that the District Court erred in refusing to vacate its judgment herein on the ground that REA is *no longer* railroad owned. (J.S. 17). Apart from the apparent inconsistency of appellants' assertions, their effort to invoke Fed. R. Civ. P. 60 (b) in the District Court was properly denied, particularly in light of the fact that the change in ownership was brought to appellants' and the District Court's attention in REA's brief and in the Government's brief *before oral argument.*[6] Because they were arguing the contrary proposition, appellants did not raise the change of ownership point until many weeks had passed after the District Court's decision was rendered. In any event, REA's ownership —whether rail-owned or not rail-owned—was immaterial to the decisions of the District Court and the Commission. Appellants' reference to the Commission's use of the word "significant" (J.S. 15) in de-

[6] The court's opinion noted that the United States had referred to the change of ownership in its brief (J.S. 2a, n.2) in which it cited articles in the *Wall Street Journal* dated July 9 and 10, 1969. The oral argument before the court was on *July 22, 1969.* Although appellants clearly had notice of the change of ownership in advance, they chose not to mention it during the argument.

scribing REA's ownership by the railroads is clearly wrenched out of context. Nowhere in the Commission's or the court's decision is their anything suggesting any substantive importance in REA's ownership and the entire rationale of the ICC's decision is unrelated to REA's ownership status.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

JOHN E. ROBSON
ELROY H. WOLFF
1156 - 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Appellee,
Railway Express
Agency, Incorporated

Of Counsel:

LEIBMAN, WILLIAMS, BENNETT,
BAIRD AND MINOW
1156 - 15th Street, N. W.
Washington, D. C. 20005

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017